

HB  
904

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# A BILL FOR AN ACT

RELATING TO NONPROFIT CORPORATIONS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1       SECTION 1. Chapter 414D, Hawaii Revised Statutes, is  
2       amended by adding a new section to be appropriately designated  
3       and to read as follows:

4       "§414D-     Purchase of memberships. (a) A public benefit  
5       corporation may not purchase any of its memberships or any right  
6       arising therefrom.

7       (b) A corporation other than a public benefit corporation  
8       may purchase its memberships only to the extent provided in  
9       section 414D-232."

10       SECTION 2. Section 414D-14, Hawaii Revised Statutes, is  
11       amended by amending the definition of "directors" to read as  
12       follows:

13       ""Directors" means individuals, designated in the articles  
14       or bylaws or elected by the incorporators, and their successors  
15       and individuals elected or appointed by any other name or title,  
16       to act as members of the board. Any person who does not have  
17       authority to vote as a member of the board is not a director as  
18       that term is used in this chapter, regardless of title."

SECTION 3. Section 414D-134, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) If the corporation has members, all the directors (except the initial directors) shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are [appointed]:

(1) Appointed by some other person; or [designated representative.]

(2) Designated."

SECTION 4. Section 414D-155, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) An officer with discretionary authority shall discharge the officer's duties under that authority:

(1) In good faith;

(2) In a manner that is consistent with the officer's duty of loyalty to the corporation;

(3) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

1           (4) In a manner the officer reasonably believes to be in  
2           the best interests of the corporation~~[-]~~ and its  
3           members, if any."

4           SECTION 5. Section 414D-222, Hawaii Revised Statutes, is  
5 amended by amending subsection (i) to read as follows:

6           "(i) A public benefit corporation shall give written  
7 notice to the attorney general twenty business days before it  
8 sells, leases, exchanges, or otherwise disposes of all, or  
9 substantially all, of its property if the transaction is not in  
10 the regular course of its activities, unless the attorney  
11 general has given the corporation a written waiver of this  
12 subsection."

13          SECTION 6. Section 414D-232, Hawaii Revised Statutes, is  
14 amended by amending subsection (a) to read as follows:

15          "(a) A corporation other than a public benefit corporation  
16 may purchase its memberships if, after the purchase is  
17 completed:

18           (1) The corporation would be able to pay its debts as they  
19           become due in the usual course of its activities; and

20           (2) The corporation's total assets would be equal to at  
21           least the sum of its total liabilities."

22          SECTION 7. Statutory material to be repealed is bracketed  
23 and stricken. New statutory material is underscored.

H.B. NO. 944

1 SECTION 8. This Act shall take effect upon its approval.

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INTRODUCED BY: 

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BY REQUEST

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JAN 22 2019

**Report Title:**

Nonprofit Corporations

**Description:**

Amends chapter 414D, Hawaii Revised Statutes, to clarify that public benefit corporations may not purchase its memberships, to clarify that a person who does not have authority to vote as a member of the board is not a director, to clarify that a corporation with members may designate its directors, to add previous wording that was inadvertently removed through Act. 87, Session Laws of Hawaii 2017, and to increase the length of time that the Attorney General has to review proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO NONPROFIT CORPORATIONS.

PURPOSE: The purpose of this bill is to amend chapter 414D, Hawaii Revised Statutes (HRS), to (1) clarify that public benefit corporations may not purchase its memberships, (2) clarify that a person who does not have authority to vote as a member of the board is not a director, (3) clarify that a corporation with members may designate its directors, (4) add previous wording that was inadvertently removed through Act 87, Session Laws of Hawaii 2017, and (5) increase the length of time that the Attorney General has to review proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.

MEANS: Add a new section to chapter 414D, HRS, and amend sections 414D-14, 414D-134(a), 414D-155(a), 414D-222(i), and 414D-232(a), HRS.

JUSTIFICATION: The bill creates a new section derived from the Model Nonprofit Corporation Act, upon which the Hawaii Nonprofit Corporations Act is based, to clarify that the assets of a public benefit corporation may not be distributed to its members by allowing the corporation to purchase memberships. The bill also removes the term "representative" that had been inadvertently included in the originally drafted section 414D-134(a) and that had changed the intended meaning of the law. Without the term "representative", section 414D-134(a) allows membership corporations to designate its directors, consistent with the intent of the Model Nonprofit Corporation Act. Other amendments

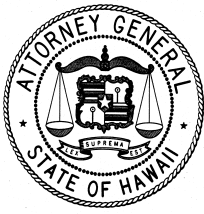
to chapter 414D, HRS, clarify ambiguities in the current law about whether a director may be a non-voting director, insert missing wording that had been inadvertently removed though Act 87, Session Laws of Hawaii 2017, and allow the Attorney General a few more days to review a proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.

Impact on the public: The amendments will help the public by addressing some of the most frequently asked questions to the Attorney General.

Impact on the department and other agencies: The amendments will allow the Attorney General more time to take action to protect charitable assets when the sale of substantially all of a public benefit corporation's assets may be in violation of other state laws.

GENERAL FUND:	None.
OTHER FUNDS:	None.
PPBS PROGRAM DESIGNATION:	ATG 100.
OTHER AFFECTED AGENCIES:	None.
EFFECTIVE DATE:	Upon approval.





**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 944, RELATING TO NONPROFIT CORPORATIONS.

**BEFORE THE:**

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

**DATE:** Friday, February 1, 2019

**TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 329

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Patrick K. Kelly, Deputy Attorney General

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Chair Takumi and Members of the Committee:

The Department of the Attorney General (Department) supports this bill. This bill amends the Hawaii Nonprofit Corporations Act, chapter 414D, Hawaii Revised Statutes (HRS). We request that the bill be passed as drafted.

The main purposes of this bill are to: (1) clarify that public benefit corporations may not purchase its memberships; (2) clarify that a person who does not have authority to vote as a member of the board is not a director; and (3) make other housekeeping amendments. If enacted, the bill would be effective upon approval.

Purchase of Memberships

Public benefit corporations are normally prohibited from making any distributions other than for charitable purposes under section 414D-19, HRS. Unlike shareholders of a corporation or partners of a partnership, members of a public benefit corporation do not have an economic ownership interest in the public benefit corporation. Therefore, a public benefit corporation's use of its charitable assets to purchase its memberships would amount to a distribution to its members and would evade the rule against distributing charitable assets for non-charitable purposes.

If passed, this bill will explicitly prohibit public benefit corporations from purchasing its memberships, prevent charitable assets from being used for non-

charitable purposes, and conform the Hawaii Nonprofit Corporations Act to the Revised Model Nonprofit Corporation Act (1987).

#### Directors Must Have Authority to Vote

Based on the numerous inquiries received by the Department, there appears to be confusion as to whether ex-officio directors, or individuals named as directors based on their position or status, who do not have any authority to vote as a member of the board are in fact directors of a nonprofit corporation for purposes of chapter 414D, HRS. Non-voting directors would be unable to perform their fiduciary duties as a director if they are unable to vote to take any action.

This bill clarifies that the term “directors” as used in the Hawaii Nonprofit Corporations Act only includes those who have the authority to vote as a member of the board.

#### Housekeeping Amendments

This bill also makes other housekeeping amendments, consistent with the Revised Model Nonprofit Corporation Act (1987) and other sections of the Hawaii Nonprofit Corporations Act, to clarify that a corporation with members may designate its directors, add words that had been inadvertently removed through Act 87, Session Laws of Hawaii 2017, and allow the Department more time to conduct a review of a proposed sale of substantially all of the assets of a public benefit corporation other than in the regular course of its activities.

We respectfully request that the Committees pass this bill as drafted.



**Testimony to the House Committee on Consumer Protection and Commerce**  
**Representative Roy Takumi, Chair**  
**Representative Linda Ichiyama, Vice Chair**  
**Friday, February 1, 2019, 2:00 p.m.**  
**Conference Room 329**  
**HB 944 - Relating to Nonprofit Corporations**

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Dear Chair Takumi, Vice-Chair Ichiyama and members of the CPC Committee:

On behalf of the Hawai'i Alliance of Nonprofit Organizations, I would like express **support of HB 944**, relating to Nonprofit Corporations with additional language suggested.

Hawai'i Alliance of Nonprofit Organizations (HANO) is a statewide, sector-wide professional association of nonprofits. Our mission is to unite and strengthen the nonprofit sector as a collective force to improve the quality of life in Hawai'i. Our member organizations provide essential services to every community in the state.

HANO supports the amendments being made to Chapter 414D that clarify that public benefit corporations may not purchase their memberships; to clarify that a person who is not a voting board member is not a director; that a corporation with members may designate its directors; and to add previous wording to increase the length of time the AG has to review proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.

We ask that you consider adding language to Chapter 414D-144 to allow electronic or digital signature to constitute a form of "written consent" by boards of directors. The proposed language is included on page 2.

We appreciate your consideration of this request to add this language. Thank you for the opportunity to submit testimony.

Mahalo,

Lisa Maruyama  
President and CEO

SECTION 1. Section 414D-144, Hawaii Revised Statutes, is amended to read as follows with proposed language underscored:

**"§414D-144 Action without meeting.** (a) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) For purposes of this section a “written consent” shall be deemed to include a consent that is executed by way of an electronic or digital signature provided that the corporation employs reasonable measures to authenticate such electronic or digital signatures. Such measures may include security measures used by board meeting portal systems that are commercially available.